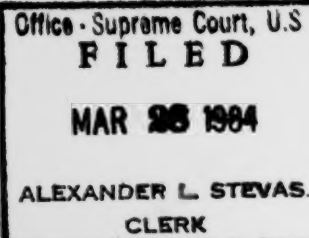


83 - 1598

No.



In the Supreme Court of the United States

October Term, 1983

WILLIAM C. WISWELL,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

THOMAS BROOKS
(Counsel of Record)
THOMAS BROOKS CHARTERED
200 Oak Park National Bank
11111 W. 95th Street
Overland Park, Kansas 66214
913-492-2424

Attorney for Petitioner
William C. Wiswell

65 pp + foldout

QUESTIONS PRESENTED

Whether the petitioner's Sixth Amendment guarantee to the right to counsel was violated by:

(a) an undisclosed, debilitating, terminal illness of his criminal defense counsel. . . .

(b) coupled with his defense counsel's physical inability to work past 3:00 in the afternoon. . . .

(c) together with the necessity for his defense counsel to ingest mood altering drugs.

Did this undisclosed physical and mental impairment of the petitioner's counsel effectively deprive petitioner of meaningful representation at trial and of adequate and effective assistance of counsel during his criminal prosecution?

Counsel notes that this case presents an accumulation of aggravated circumstances, portions of which have been touched upon only collaterally commencing with the initial landmark decision *Powell v. Alabama*, 287 U.S. 45 (1932) followed by *Gideon v. Wainwright*, 372 U.S. 355 (1963) and *Argersinger v. Hamlin*, 407 U.S. 25 (1972). The failure of the Kansas Supreme Court to consider the petitioner's petition for review and vacate the decision of its own Court of Appeals, suggests that the grant of certiorari and summary reversal by this Court is appropriate and necessary in order to protect the integrity of the judicial process.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Kansas Supreme Court were:

William C. Wiswell, defendant/appellant

and

The State of Kansas, plaintiff/appellee

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No.
In the Supreme Court of the United States
October Term, 1983

WILLIAM C. WISWELL,
Petitioner,
vs.
STATE OF KANSAS,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF KANSAS**

Petitioner, William C. Wiswell, respectfully prays that a Writ of Certiorari issue to review the order of the Supreme Court of the State of Kansas entered in the captioned proceedings on January 30, 1984.

OPINIONS BELOW

The unreported memorandum opinion of the Kansas Court of Appeals affirming petitioner's conviction, review of which is sought, is captioned The State of Kansas, Appellee, v. William C. Wiswell, Appellant, No. 54,873 - October 6, 1983 - not designated for publication and is attached as Appendix A. The order of the Supreme Court of the State of Kansas denying a petition for review filed January 30, 1984 is unreported and is attached as Appendix B.

JURISDICTION

The order of the Supreme Court of the State of Kansas denying petitioner's petition for review was filed January 30, 1984. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution reads as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATUTORY PROVISIONS INVOLVED

Kansas Statutes Annotated 21-3205, 21-3701, 21-3301, 21-3718, 21-3302 and 21-3701(b) (Appendix E).

STATEMENT OF THE CASE

In this case, the Supreme Court of the State of Kansas refused to review an unpublished opinion by the Kansas Court of Appeals affirming the criminal conviction of the petitioner of the crimes of arson, conspiracy to commit arson and conspiracy of theft by deception.

Petitioner's trial counsel, unknown to petitioner, the trial judge or the prosecutor, was suffering from a terminal illness which caused him to be physically unable to work past 3:00 in the afternoon and further necessitated his ingestion of mood-altering drugs in order to allow himself to carry on. Petitioner's trial counsel died several months following petitioner's prosecution and trial (Appendix D).

Petitioner seeks certiorari because he contends that he was deprived of adequate and effective assistance of counsel and petitioner seeks to correct what he feels is a plain error of law. The essential facts follow:

The prosecution in this matter arose out of a house fire which occurred at 101 S. Walnut, Olathe, Johnson County, Kansas.

The fire occurred at approximately 12:58 a.m. on May 8, 1981.

Subsequently, the State of Kansas, by and through the Johnson County District Attorney's Office, charged the petitioner, William C. Wiswell, with conspiracy to commit arson, aiding and abetting the crime of arson, and conspiracy to commit theft by deception (Appendix E) and the Court ordered a Warrant issued on May 14, 1981. The petitioner was arrested and first appeared before the District Court on May 19, 1981. At his formal arraignment on December 9, 1981, the petitioner entered a plea of not guilty. The case was placed in posture for trial

based upon an Amended Information filed by the State on November 20, 1981 (Appendix F). The case was assigned to the Honorable John Gariglietti, Associate Judge of the District Court, Crawford County, Kansas and proceeded to trial before Judge Gariglietti. The trial occurred between April 12, 1982 and April 16, 1982. After deliberation, the jury arrived at verdicts of guilty (Appendix G).

The petitioner's trial counsel was Hugh Harrison Kreamer, a well-known, well-liked trial attorney who was a past county attorney for Johnson County and a past President of the Johnson County Bar Association.

During the course of the petitioner's representation by Mr. Kreamer, Mr. Kreamer was in a death fight against the ravages of mesothelioma of the chest. He was in the final trimester of his fight against cancer during the petitioner's trial; however, he did not disclose to his client, the petitioner herein, or for that matter even his own law partner, the nature, extent and seriousness of his illness or the fact that it was a terminal illness. Following the petitioner's conviction, his counsel, Mr. Kreamer, sent him a letter which indicated that it was a shame that the jury returned a verdict of guilty and that was about all that could be done about it.

Mr. Wiswell's present counsel entered his appearance on behalf of the petitioner on April 26, 1982 and filed Motion for New Trial on April 26, 1982 (Appendix H). A Brief in Support of the Motion for New Trial was filed concomitant therewith (Appendix I). The Motion for New Trial was set by Judge Gariglietti for hearing on May 24, 1982 and following hearing and testimony on that date was continued to July 22, 1982 for another day's evidentiary hearing and was thereafter concluded on July 23, 1982. A Journal Entry of new trial proceedings overruling the application for new trial was filed on August 16, 1982 (Appendix J).

Among witnesses presented in the petitioner's behalf at the time of the hearing of his Motion for New Trial was Robert Boudet, M.D., Ph.D., who is Chief of Staff of the V.A. Hospital, 4801 E. Linwood Blvd., Kansas City, Missouri. Dr. Boudet specifically commented upon the debilitating effect of mesothelioma of the chest and commented as well upon the regimen of medication which petitioner's trial counsel was under, commenting that the medication and the disease would have the likely outcome of judgment impairment and inability to concentrate. Further inquiry by petitioner's trial counsel of this cancer specialist was not allowed by the trial Court and was one of the issues on appeal.

Following the conclusion of evidentiary presentation with regard to newly discovered evidence and the debilitating problems that were affecting the petitioner's trial counsel, Mr. Kreamer, the Court overruled the Motion for New Trial and sentenced the petitioner on July 23, 1982 (Appendix J).

On Motion of the petitioner, his application for parole was sustained and an Order of Probation was entered on August 19, 1982 (Appendix K).

A Notice of Appeal was filed and thereafter this appeal was perfected to the Kansas Court of Appeals. The issues on appeal in the filed Brief raised for consideration the myriad of Federal Decisions and published American Bar Association standards relative to the criminal defense function.

Specific direction by the petitioner to the appellate Courts in Kansas of *U.S. v. Decoster*, 487 F.2d 1197 (1973), 624 F.2d 196 (1976), *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974), and *Cooper v. Fitzharris*, 551 F.2d 1162 (1977), were not persuasive at the State level.

REASONS FOR GRANTING REVIEW

The actions of the Kansas Supreme Court in refusing to overturn the petitioner's conviction is in keeping with hazy and ill-defined standards on competency of counsel which have become more hazy and less defined since *Schoonover v. State*, 218 Kan. 377, 543 P.2d 881 (1975), cert. den. 424 U.S. 944, 47 L.Ed. 2d 349, 96 S. Ct. 1412 (1976), which was brought before this Court on a Petition for Writ of Certiorari by petitioner's instant counsel in 1975.

The granting of certiorari in the present case is essential to meet the concern many members of the Kansas Bar have and in particular, the criminal defense Bar have with regard to the ability by appellate courts in the State of Kansas to sidestep the question of effective assistance of counsel by falling back on a "totality" rationale. The "totality" concept first espoused in *Schoonover v. State*, *ibid.*, has given appellate courts in the State of Kansas blanket and random authority to affirm any criminal convictions notwithstanding dishonest, improper and unethical counsel (*Schoonover v. State*, *ibid.*, - see also *In re: Steere*, 217 Kan. 276 (1975), 536 P.2d 54, but also cases such as the instant case wherein the lawyer, by his own admission in the hospital records of the M.D. Anderson Tumor Institute, Houston, Texas, is an explicit admission that he cannot work past 3:00 in the afternoon (Appendix C).

The clear mandates of *U.S. v. Decoster*, *ibid.*, as well as the guiding suggestions of *The American Bar Association's Standards for Criminal Justice*, *The Defense Function*, have been totally sidestepped by a State Supreme Court that is content to rely upon a totality concept when dealing in matters involving intentionally or unintentionally impaired trial counsel.

The overzealous nature of State Appellate Courts to affirm criminal convictions has trod on the constitu-

tional rights of criminal defendants and the instant appeal seems to summarize and crystalize an area which should be properly defined by the United States Supreme Court in order to allow State Appellate Courts to be properly guided in the future.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted, the judgment of the District Court of Johnson County, Kansas No. K-40005, the Kansas Court of Appeals and the Supreme Court of Kansas should be vacated and the case should be remanded to the Kansas Supreme Court with directions to give and grant the petitioner herein a new trial with his being afforded adequate counsel therefor. Petitioner suggests that the relief requested may be considered and granted summarily, however, petitioner is prepared to proceed with a non-summary disposition of his request in the event the Petition for Writ of Certiorari is granted.

Respectfully submitted,

THOMAS BROOKS

Attorney for Petitioner

William C. Wiswell

LAW OFFICES OF:

THOMAS BROOKS CHARTERED

200 Oak Park National Bank

11111 W. 95th Street

Overland Park, Kansas 66214

913-492-2424

APPENDIX

APPENDIX A

No. 54,873

IN THE COURT OF APPEALS OF THE
STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

WILLIAM C. WISWELL,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; JOHN GARIGLIETTI, assigned judge. Opinion filed October 6, 1983. Affirmed.

Thomas Brooks, of Thomas Brooks Chartered, of Overland Park, for appellant.

Joseph E. Cosgrove, Jr., and *Michael B. Buser*, assistant district attorneys, *Dennis W. Moore*, district attorney, and *Robert T. Stephan*, attorney general, for appellee.

Before REES, P.J., ABBOTT, J., and HARRY G. MILLER, District Judge Retired, assigned.

Per Curiam: This is a direct appeal by defendant from his convictions and sentencing for aiding and abetting arson (K.S.A. 21-3718; K.S.A. 21-3205), attempted felony theft (K.S.A. 21-3701 [b]; K.S.A. 21-3301), conspiracy to commit arson (K.S.A. 21-3718; K.S.A. 21-3302) and con-

spiracy to commit felony theft (K.S.A. 21-3701 [b]; K.S.A. 21-3302).

Defendant's contentions on appeal are that the trial judge committed error in refusing admission of certain expert opinion testimony at the hearing on the motion for a new trial and his refusal of a new trial was an abuse of discretion. The principal issue involved is whether defendant was denied effective assistance of counsel. This question was raised in the trial court by the motion for a new trial and was the subject of a three-day evidentiary hearing.

We find no reversible error in exclusion of expert opinion evidence. The examination and testimony of Dr. Boudet discloses no exclusion of evidence on the ground Dr. Boudet was not qualified to testify as an expert witness. Neither does it demonstrate exclusion of the doctor's opinions as to the nature of difficulties experienced by persons having the conditions and undergoing the medical regimen revealed by the medical record in evidence. The doctor's "message" is clear in the record on appeal and it was effectively conveyed to the trial judge. The rejected testimony concerned the particular and specific nature and extent of limitations suffered by Mr. Kreamer at the times material herein and as those limitations may then have affected his professional conduct. We find no error in the exclusion of the testimony indicated by the posed questions to which objections were sustained. Our conclusion is buttressed by the doctor's testimony on cross-examination.

Did the trial judge abuse his discretion and commit error in rejecting the claim defendant was denied effective assistance of counsel? We conclude he did not.

We need not reiterate that which appears in the record on appeal. It is well known to the parties and counsel. The question is whether at the hearing on the motion for

a new trial and as a matter of law the defendant sustained his burden of proof that the actual representation he was afforded constituted ineffective assistance of counsel. *State v. Voiles*, 226 Kan. 469, 471, 601 P.2d 1121 (1979); *Lee v. State*, 220 Kan. 221, 222, 552 P.2d 626 (1976); *Schoonover v. State*, 218 Kan. 377, 385, 543 P.2d 881 (1975); *Widener v. State*, 210 Kan. 234, 236, 499 P.2d 1123 (1972); *Schoonover v. State*, 2 Kan.App.2d 481, 486-487, 582 P.2d 292, rev. denied 225 Kan. 845 (1978).

The standard to be met in satisfaction of a defendant's constitutional right to effective assistance of counsel was thoroughly discussed in *Schoonover v. State*, 2 Kan.App.2d at 484-488. The relevant syllabi of that case, 2 Kan.App.2d 481, Syl. ¶¶ 2, 3 and 4, have since become this state's case law exposition of the rules and standard relative to determination of effective assistance of counsel. *State v. Tyus*, 232 Kan. 325, 331-332, 654 P.2d 947 (1982); *State v. Meisbauer*, 232 Kan. 291, 299, 654 P.2d 934 (1982); *State v. Crossman*, 229 Kan. 384, 389, 624 P.2d 461 (1981); *State v. Bryant*, 228 Kan. 239, 248, 613 P.2d 1348 (1980); *State v. Rice*, 227 Kan. 416, 418-419, 607 P.2d 489 (1980); *State v. Voiles*, 226 Kan. at 470-471; *State v. Schrum*, 226 Kan. 125, 126-127, 595 P.2d 1127 (1979).

Defendant's claim of ineffective assistance of counsel was extensively and thoroughly "tried" to the trial judge. Not only do we fail to see that the assistance of counsel afforded defendant deviated from that reasonably expectable of Mr. Kreamer even had he been in perfect health, we are not persuaded that when the controlling rules and standard are applied in reviewing Mr. Kreamer's representation of defendant, it must be concluded defendant was not afforded the assistance of counsel to which he was entitled no matter who his counsel may have been.

Affirmed.

APPENDIX B

(Filed January 30, 1984)

**IN THE SUPREME COURT OF THE STATE
OF KANSAS**

No. 82-54873-A

State of Kansas,
Appellee,

v.

William C. Wiswell,
Appellant.

You are hereby notified of the following action taken
in the above entitled case:

PETITION FOR REVIEW.

DENIED.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date: January 30, 1984



The University of Texas System Cancer Center

M. D. Anderson Hospital and Tumor Institute
Texas Medical Center • 6723 Bertner Avenue • Houston, Texas 77030

Medical Records Department

AFFIDAVIT

Patient name: Hugh Harrison Kreamer

Patient number: 16 03 18

My name is Michael Allen Parr, I am over 18 years of age, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the medical records at M. D. Anderson Hospital and Tumor Institute, a health care facility. Attached are 117-pages of records from the M. D. Anderson Hospital and Tumor Institute. These said 117-pages of records are kept in the regular course of business, and it was the regular course of business in the M. D. Anderson Hospital and Tumor Institute for an employee or representative, or a doctor permitted to practice in the M. D. Anderson Hospital and Tumor Institute with personal knowledge of the act, event or condition recorded to make memorandum or record or to transmit information thereof to be included in such memorandum or record; and the memorandum or record was made at or near the time of the act, event or condition recorded or reasonably soon thereafter. The records attached hereto are exact duplicates of the original, and it is a rule of the M. D. Anderson Hospital and Tumor Institute to not permit originals to leave the facility.

Michael A. Parr
Signature of Affiant

Sworn to and subscribed before me on the 16th day of July, 1982.

Notary public in and for Harris County, Texas.

My Commission expires on: July 12, 1985.

Kay E. Burton
Signature of Notary

KAY E. BURTON

Notary Public State of Texas

My Commission Expires July 12, 1985

Booded by L. Alexander Lovett, Lawyers Surety Corp



JUL 23 1982

The University of Texas System Cancer Center

M. D. Anderson Hospital and Tumor Institute

Texas Medical Center • 6723 Bertner Avenue • Houston, Texas 77030

Medical Records Department

A6

July 21, 1982

John Blongewich
Suite 200 Oak Park National Bank
11111 West 95th Street
Overland Park, Kansas 66214

Re: Hugh Harrison Kreamer
M.D.A.H.# 16 03 18

Dear Mr. Blongewicz:

Upon review of the above named medical record a numbering error was made between page fourteen (14) and sixteen (16) a skip was made in the numbering with the number fifteen (15) being missed. The copy of the medical record you were mailed on July 16, 1982 contains this error.

Michael A. Parr

Michael A. Parr
Custodian of the Record
M. D. Anderson Hospital & Tumor Institute
Medical Record Department

Sworn to and subscribed before me on the 21st day of July 1982
Notary Public in and for the State of Texas.

My Commission expires on July 12, 1985

KAY E. BURTON

Notary Public State of Texas

My Commission Expires July 12, 1985

Bonded by L. Alexander Lovett, Secretary, Corp.

Kay E. Burton
Signature of Notary

FOLLOW-UP AND PROGRESS NOTES (CONT'D.)

DATE

KREAMER, HUGH
16 03 18

FEB-12-82 PAIN CLINIC:

This patient is referred for consultation, because of pain in the right lower quadrant of his chest. This is through and through pain, and in addition to this, he has pain in his right shoulder from time to time. This has been present to a severe degree for the past two months. He has had it since last summer, but he feels that this is getting more intense, and occurs more frequently. Apparently, the only relief he ever gets from this is when he can take sleeping pills, and his Tylenol III and get into the bed at nighttime. He states that the pain now is becoming debilitating and he cannot work more than to 3 o'clock in the afternoon. He has been taking plain Tylenol and Tylenol III only at nighttime. He was placed on Amitriptyline. He does not know what dose. However, he did not take this more than about 20 days, and this was not on a regular basis.

The patient is only going to be here today. Therefore, we cannot have him seen by other members of the pain group. He does not know when he will be back here. I indicated to him, our approach to pain control and that it was multidisciplinary and therefore, it would be more desirable for him to spend a few days with us. Unfortunately, this is not possible at the present time.

The patient has been using a transcutaneous electrical nerve stimulator for about the past month. He is not sure that this is causing him any relief. However, he continues to wear. Certainly, he has not

decreased the number of pain pills he has had to take. Of course, it is possible that the intensity of the pain has been increasing. Therefore, failure to decrease the pain medication, per say, would not be an adequate measure of the effectiveness of the stimulator.

I am going to place him on Zomax, 200 mg. every six hours. Between these doses, he should take Tylenol extra-strength during the waking hours. I have also stress the importances of the Amitriptyline and would for him to take 50 mg. per night and increase this to 150 mg. per night eventually.

We will see this patient back here, whenever he returns for his next visit to the Developmental Therapeutics Clinic.

C.S. Hill, Jr.
C.S. Hill, Jr., M.D./mc
nd: 2-12-82; nt: 2-16-82 2/5/82 R.P.

A8

APPENDIX D

State of Missouri
City of Kansas City

This is a Certified Copy of an Original Document

I hereby certify that this copy is an exact reproduction of the certificate of death for the person named therein as it now appears in the permanent records of the Bureau of Vital Statistics, Kansas City, Missouri, Witness my hand as Director of Health, Kansas City, Missouri this date of

JAN 27 1983

Karl E. Hanson M.D.

DO NOT WRITE
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HANDBOOK

JAN

VS 300
Rev. 1/78

DECEDENT

IF DEATH
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INSTITUTION,
SEE HANDBOOK
REGARDING
COMPLETION OF
RESIDENCE ITEMS

PARENTS

DISPOSITION

CERTIFIER

CONDITIONS
IF ANY
WHICH HAVE
BECOME THE
IMMEDIATE
CAUSE
STARTING THE
UNITS OF TIME,
CAUSE LASTCAUSE OF
DEATHDEPARTMENT OF SOCIAL SERVICES - MISSOURI DIVISION OF HEALTH
(PHYSICIAN, MEDICAL EXAMINER OR CORONER)

CERTIFICATE OF DEATH

REGISTRATION DISTRICT NO.

PRIMARY REGISTRATION DISTRICT NO.

STATE FILE NUMBER

124 82-104913

REGISTRAR'S NO.

1. DECEASED - NAME FIRST MIDDLE LAST HUGH H. KREAMER		2. SEX MALE	3. DATE OF DEATH (Mo., Day, Yr.) OCTOBER 18, 1982
4. RACE - (e.g., White, Black, American Indian, etc.) (Specify) WHITE	5a. AGE - Last Birthday (Yrs.) 57	5b. UNDECEASED YEAR MONTH DAYS 57	6. DATE OF BIRTH (Mo., Day, Yr.) OCTOBER 8, 1925
7a. CITY, TOWN OR LOCATION OF DEATH KANSAS CITY		7b. HOSPITAL OR OTHER INSTITUTION - Name (If not in either, give street and number) ST. LUKES HOSPITAL	
8. STATE OF BIRTH (If not in U.S.A., name country) KANSAS	9. CITIZEN OF WHAT COUNTRY U.S.A.	10. MARRIED, NEVER MARRIED, WIDOWED, DIVORCED (Specify) DIVORCED	11. SURVIVING SPOUSE (If wife, give maiden name) WAS DECEASED EVER IN U.S. ARMED FORCES? 12. <input type="checkbox"/> YES <input type="checkbox"/> NO
13. SOCIAL SECURITY NUMBER 513-12-7473		14a. USUAL OCCUPATION (Give kind of work done during most of working life, even if retired) ATTORNEY	
15a. RESIDENCE - STATE KANSAS	15b. COUNTY JOHNSON	15c. CITY, TOWN OR LOCATION AND ZIP CODE OLATHE	15d. STREET AND NUMBER 25800 W. 127th
16. FATHER - NAME FIRST MIDDLE LAST JOHN D. KREAMER		17. MOTHER - MAIDEN NAME FIRST MIDDLE LAST CATHERINE HARRISON	
18a. INFORMANT - NAME (Type or Print) SCOTT H. KREAMER		18b. MAILING ADDRESS STREET OR R.F.D. NO. CITY OR TOWN STATE 2505 W. 83rd LEAWOOD, KANSAS 66206	
19a. BURIAL, CREMATION, REMOVAL, OTHER (Specify) DATE REMOVAL OCTOBER 20, 1982		19b. CEMETERY OR CREMATORY - NAME OAK LAWN MEMORIAL GARDENS	
19c. LOCATION CITY OR TOWN STATE OLATHE, KANSAS		20a. NAME OF FACILITY D.W. NEWCOMER'S SONS	
20b. ADDRESS OF FACILITY OVERLAND PARK, KANSAS		21. DATE RECEIVED BY REGISTRAR (Mo., Day, Yr.) OCT. 19, 1982	
21a. (Signature) <i>Ruth O. Boyt</i>		21b. (Signature and Title) <i>Karl E. Hanson</i>	
22a. To the best of my knowledge, death occurred at the time, date and place and due to the cause(s) stated. (Signature and Title) DATE SIGNED (Mo., Day, Yr.) 10-20-82		22b. HOUR OF DEATH 11:30 A.M.	
22c. NAME OF ATTENDING PHYSICIAN IF OTHER THAN CERTIFIER (Type or Print) KARL HANSON JR. M.D.		22d. MO. LICENSE NO. 24R 2800	
23a. ON THE BASIS OF EXAMINATION AND/OR INVESTIGATION, IN MY OPINION DEATH OCCURRED AT THE TIME, DATE AND PLACE AND DUE TO THE CAUSE(S) STATED. (Signature and Title) DATE SIGNED (Mo., Day, Yr.) 10-20-82		23b. HOUR OF DEATH 11:30 A.M.	
23c. PRONOUNCED DEAD (Mo., Day, Yr.) 10-20-82		23d. AT 11:30 A.M.	
24a. NAME AND ADDRESS OF CERTIFIER (PHYSICIAN, MEDICAL EXAMINER OR CORONER) (Type or Print) KARL HANSON JR. M.D. 4320 WORNALL RD KCMO		24b. IF HOSP OR INST. Indicate DOA, OP/Emr, Rm., Inpatient (Specify) INPT	
25. IMMEDIATE CAUSE (ENTER ONLY ONE CAUSE PER LINE FOR (a), (b), AND (c).) Mesothelioma of chest		26. INTERVAL BETWEEN ONSET AND DEATH 19 mo	
27. DUE TO, OR AS A CONSEQUENCE OF Mesothelioma of chest		28. INTERVAL BETWEEN ONSET AND DEATH 19 mo	
29. OTHER SIGNIFICANT CONDITIONS - Conditions contributing to death but not related to cause given in PART I (a) ACC. SUICIDE, MOM. UNDET. OR PENDING INVEST (Specify)		29a. DATE OF INJURY (Mo., Day, Yr.) 29b. HOUR OF INJURY 29c. M	
29d. DESCRIBE HOW INJURY OCCURRED INJURY AT WORK (Specify Yes or No)		29e. PLACE OF INJURY - At home, farm, street, factory, office building, etc. (Specify) 29f. LOCATION (STREET OR R.F.D. NO., CITY OR TOWN, COUNTY, STATE)	
29g. IF DECEASED WAS FEMALE WAS THERE A PREGNANCY IN LAST 90 DAYS 30. <input type="checkbox"/> YES <input type="checkbox"/> NO <input type="checkbox"/> UNKNOWN			

APPENDIX E

21-3205. Liability for crimes of another. (1) A person is criminally responsible for a crime committed by another if he intentionally aids, abets, advises, hires, counsels or procures the other to commit the crime.

(2) A person liable under subsection (1) hereof is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by him as a probable consequence of committing or attempting to commit the crime intended.

(3) A person liable under this section may be charged with and convicted of the crime although the person alleged to have directly committed the act constituting the crime lacked criminal capacity or has not been convicted or has been acquitted or has been convicted of some other degree of the crime or of some other crime based on the same act. [L. 1969, ch. 180, § 21-3205; July 1, 1970.]

21-3701. Theft. Theft is any of the following acts done with intent to deprive the owner permanently of the possession, use or benefit of his property:

(a) Obtaining or exerting unauthorized control over property; or

(b) Obtaining by deception control over property; or

(c) Obtaining by threat control over property; or

(d) Obtaining control over stolen property knowing the property to have been stolen by another.

Theft of property of the value of fifty dollars (\$50) or more is a class D felony. Theft of property of the value of less than fifty dollars (\$50) is a class A misdemeanor.

Nothing herein shall prohibit the removal in a lawful manner, by towing or otherwise, of personal property unlawfully placed or left upon real property. [L. 1969, ch. 180, § 21-3701; L. 1972, ch. 116, § 1; July 1.]

21-3301. Attempt. (1) An attempt is any overt act toward the perpetration of a crime done by a person who intends to commit such crime but fails in the perpetration thereof or is prevented or intercepted in executing such crime.

(2) It shall not be a defense to a charge of attempt that the circumstances under which the act was performed or the means employed or the act itself were such that the commission of the crime was not possible.

(3) An attempt to commit a class A felony is a class C felony. An attempt to commit a felony other than a class A felony is a class E felony. An attempt to commit a misdemeanor is a class C misdemeanor. [L. 1969, ch. 180, § 21-3301; July 1, 1970.]

21-3718. Arson. (1) Arson is knowingly, by means of fire or explosive:

(a) Damaging any building or property in which another person has any interest without the consent of such other person; or

(b) Damaging any building or property with intent to injure or defraud an insurer or lienholder.

(2) Arson is a class C felony. [L. 1969, ch. 180, § 21-3718; July 1, 1970.]

21-3302. Conspiracy. (1) A conspiracy is an agreement with another person to commit a crime or to assist to commit a crime. No person may be convicted of a conspiracy unless an overt act in furtherance of such

conspiracy is alleged and proved to have been committed by him or by a co-conspirator.

(2) It shall be a defense to a charge of conspiracy that the accused voluntarily and in good faith withdrew from the conspiracy, and communicated the fact of such withdrawal to one or more of his co-conspirators, before any overt act in furtherance of the conspiracy has been committed by him or by a co-conspirator.

(3) Conspiracy to commit a class A felony is a class C felony. Conspiracy to commit a felony other than a class A felony is a class E felony. A conspiracy to commit a misdemeanor is a class C misdemeanor. [L. 1969, ch. 180, § 21-3302; July 1, 1970.]

21-3701. Theft. Theft is any of the following acts done with intent to deprive the owner permanently of the possession, use or benefit of his property:

* * *

(b) Obtaining by deception control over property; or

* * *

APPENDIX F

(Filed November 20, 1981)

**IN THE DISTRICT COURT OF JOHNSON
COUNTY, KANSAS**

NO. K-40005
DIV.

THE STATE OF KANSAS,
Plaintiff,

vs.

WILLIAM C. WISWELL,
Defendant.

AMENDED INFORMATION

STATE OF KANSAS, JOHNSON COUNTY, ss:

I, Michael B. Buser, an Assistant District Attorney of said County, being duly sworn on oath state to the Court that on or about the 8th day of May, 1981 in said County of Johnson and State of Kansas,

WILLIAM C. WISWELL

did then and there unlawfully, knowingly, willfully and feloniously, by means of fire or explosive, aid and abet in the damaging of any building or property, to-wit: a house and its contents located at 101 South Walnut, Olathe, Johnson County, Kansas, with intent to injure or defraud insurers or lien holders, to-wit: the Patron's Mutual Insurance Association and the Trinity Universal Insurance Company of Kansas, Inc., in violation of K.S.A. 21-3718, K.S.A. 21-3205 and K.S.A. 21-4501(c).

COUNT II-Further, that on or about the 8th day of May, 1981, in said County of Johnson and State of Kansas, WILLIAM C. WISWELL did then and there unlawfully, feloniously and willfully attempt to obtain and exert by deception control over property, to-wit: United States currency in the amount of forty thousand dollars (\$40,000.00), with the intention to permanently deprive the owners, to-wit: the Patron's Mutual Insurance Association and the Trinity Universal Insurance Company of Kansas, Inc. of the possession, use or benefit of said property, of a value of \$100.00 or more, in violation of K.S.A. 21-3701, K.S.A. 21-3301 and K.S.A. 21-4501(e).

COUNT III-Further, that on or about the 1st day of Sept., 1980, through the 14th day of May, 1981, in said County of Johnson and State of Kansas, WILLIAM C. WISWELL did then and there unlawfully, willfully and feloniously agree with another person, to-wit: John Martin and another or others unknown to commit arson and overt acts in furtherance of the conspiracy were

2) On Wednesday, May 6, 1981, John Martin and William C. Wiswell removed a Motorola television set from 101 South Walnut, Olathe, Kansas and took it to Olathe TV and Radio Repair.

3) On Wednesday, May 6, 1981, William C. Wiswell telephoned William J. Gray, owner of Olathe TV and Radio Repair, and requested some junk television sets.

4) On Thursday, May 7, 1981, after the extermination of the residence at 101 South Walnut, Olathe, Kansas, John Martin and his family left the residence and went to the Kansas City Motel.

5) On Thursday, May 7, 1981, John Martin and William C. Wiswell removed several television sets from

Olathe TV and Radio Repair and placed them inside the residence of 101 South Walnut, Olathe, Kansas.

Committed by William C. Wiswell and his co-conspirators, to-wit: John Martin and another or others unknown:

1) On Tuesday, May 5, 1981, John Martin contacted the Olathe Pest Control to arrange for the fumigation of the house at 101 South Walnut, Olathe, Kansas.

2) On Wednesday, May 6, 1981, John Martin and William C. Wiswell removed a Motorola television set from 101 South Walnut, Olathe, Kansas and took it to Olathe TV and Radio Repair.

3) On Wednesday, May 6, 1981, William C. Wiswell telephoned William J. Gray, owner of Olathe TV and Radio Repair, and requested some junk television sets.

4) On Thursday, May 7, 1981, after the extermination of the residence at 101 South Walnut, Olathe, Kansas, John Martin and his family left the residence and went to the Kansas City Motel.

5) On Thursday, May 7, 1981, John Martin and William C. Wiswell removed several television sets from Olathe TV and Radio Repair and placed them inside the residence of 101 South Walnut, Olathe, Kansas.

6) On Thursday, May 7, 1981, John Martin and William C. Wiswell removed from William C. Wiswell's law office a television set, a sewing machine, a stereo turntable and five (5) Citizen Band radios and placed them in the residence at 101 South Walnut, Olathe, Kansas.

7) On Friday, May 8, 1981, a person or persons unknown set an arson fire at 101 South Walnut in Olathe, Kansas that resulted in significant structure and contents damage.

8) On Friday, May 8, 1981, William C. Wiswell contacted the Trabert Insurance Agency reporting the fire and causing an insurance property loss notice to be filed.

The above overt acts constitute violation of K.S.A. 21-3718, K.S.A. 21-3302 and K.S.A. 21-4501(e).

COUNT IV-Further, that on or about the 1st day of Sept., 1980, through the 14th day of May, 1981, in said County of Johnson and State of Kansas, WILLIAM C. WISWELL did then and there unlawfully, willfully and feloniously agree with another person, to-wit: John Martin and another or others unknown to commit theft by deception and overt acts in furtherance of the conspiracy were committed by William C. Wiswell and his co-conspirators, to-wit: John Martin and another or others unknown:

1) On Tuesday, May 5, 1981, John Martin contacted the Olathe Pest Control to arrange for the fumigation of the house at 101 South Walnut, Olathe, Kansas.

2) On Wednesday, May 6, 1981, John Martin and William C. Wiswell removed a Motorola television set from 101 South Walnut, Olathe, Kansas and took it to Olathe TV and Radio Repair.

3) On Wednesday, May 6, 1981, William C. Wiswell telephoned William J. Gray, owner of Olathe TV and Radio Repair, and requested some junk television sets.

4) On Thursday, May 7, 1981, after the extermination of the residence at 101 South Walnut, Olathe, Kansas, John Martin and his family left the residence and went to the Kansas City Motel.

5) On Thursday, May 7, 1981, John Martin and William C. Wiswell removed several television sets from Olathe

TV and Radio Repair and placed them inside the residence of 101 South Walnut, Olathe, Kansas.

6) On Thursday, May 7, 1981, John Martin and William C. Wiswell removed from William C. Wiswell's law office a television set, a sewing machine, a stereo turntable and five (5) Citizen Band radios and placed them in the residence at 101 South Walnut, Olathe, Kansas.

7) On Friday, May 8, 1981, a person or persons unknown set an arson fire at 101 South Walnut in Olathe, Kansas that resulted in significant structure and contents damage.

8) On Friday, May 8, 1981, William C. Wiswell contacted the Trabert Insurance Agency reporting the fire and causing an insurance property loss notice to be filed.

The above overt acts constitute violation of K.S.A. 21-3701(b), K.S.A. 21-3302 and K.S.A. 21-4501(e).

/s/ Michael B. Buser

Assistant District Attorney MBB/lv

Subscribed in my presence and sworn to before me by Michael B. Buser this 19 day of November, 1981.

/s/ (Illegible)

Judge of the District Court

WITNESSES:

Stephen Wilson
Don Watkins
Det. Howard Kannady
William Hogget
Oakley Smith
Phillip Reed
Terry Wood
Paul Willy
Steve Blackwell
David Plummer
Greg Lewis
Fire Chief Dennis Murphy
Det. Larry Griffin
Nancy Martin
Carolyn Brite
Det. Roger LaRue
Ptl. Gary McGill
Lt. Jeff Herrman
Charles Buchanan
William Willis
William Chapin
Gary Dirks
Orin Trabert

Jim Aldridge
Bill McGary
Jim Rice
Theresa Martin
Vince Werkowich
Lawrence Stanford
John Martin
Beverly Freeman
David Oldham
Gary Richard
Pete Bell
Peter Trimm
Mary Allen
A. Earl Allen
John Tipper
Mary J. Smith
Harold Brown
Det. Joe Pruett
Marilyn Latner
Laura Vohs
William Gray
Officer T. Ellsworth
Sgt. Phillip Patterson
Lt. William Hibbard
Gary Richard

APPENDIX G

(Filed April 16, 1982)

IN THE DISTRICT COURT OF JOHNSON COUNTY,
KANSAS
CRIMINAL COURT DEPARTMENT

No. K-40005

STATE OF KANSAS,
Plaintiff,

v.

WILLIAM C. WISWELL,
Defendant.

VERDICT

We, the jury, find the defendant guilty of conspiracy to commit theft by deception.

/s/ Harvey J. McCarte
Foreman

VERDICT

We, the jury, find the defendant not guilty of conspiracy to commit theft by deception.

.....
Foreman

(Filed April 16, 1982)

IN THE DISTRICT COURT OF JOHNSON COUNTY,
KANSAS
CRIMINAL COURT DEPARTMENT

No. K-40005

STATE OF KANSAS,
Plaintiff,

v.

WILLIAM C. WISWELL,
Defendant.

VERDICT

We, the jury, find the defendant guilty of attempting to commit theft by deception, and that the value of the property which the defendant attempted to exert unauthorized control over to be \$100.00, or more.

/s/ Harvey J. McCarte
Foreman

VERDICT

We, the jury, find the defendant not guilty of attempting to commit theft by deception.

.....
Foreman

A20

(Filed April 16, 1982)

IN THE DISTRICT COURT OF JOHNSON COUNTY,
KANSAS
CRIMINAL COURT DEPARTMENT

No. K-40005

STATE OF KANSAS,
Plaintiff,

v.

WILLIAM C. WISWELL,
Defendant.

VERDICT

We, the jury, find the defendant guilty of aiding and abetting the crime of arson.

/s/ Harvey J. McCarte
Foreman

VERDICT

We, the jury, find the defendant not guilty of aiding and abetting the crime of arson.

.....
Foreman

(Filed April 16, 1982)

IN THE DISTRICT COURT OF JOHNSON COUNTY,
KANSAS
CRIMINAL COURT DEPARTMENT

No. K-40005

STATE OF KANSAS,
Plaintiff,

v.

WILLIAM C. WISWELL,
Defendant.

VERDICT

We, the jury, find the defendant guilty of conspiracy
to commit arson.

/s/ Harvey J. McCarte
Foreman

VERDICT

We, the jury, find the defendant not guilty of con-
spiracy to commit arson.

.....
Foreman

APPENDIX H

(Filed April 26, 1982)

**IN THE DISTRICT COURT OF JOHNSON COUNTY,
KANSAS
CRIMINAL COURT DEPARTMENT**

NO. K-40005

**STATE OF KANSAS,
Plaintiff,**

vs.

**WILLIAM WISWELL,
Defendant.**

**MOTION FOR NEW TRIAL OR, IN THE
ALTERNATIVE TO ARREST JUDGMENT**

COMES NOW the defendant, by and through his attorney of record, Thomas Brooks, and moves the Court for its Order, pursuant to K.S.A. 22-3501, granting to the defendant a new trial or, in the alternative, the defendant moves the Court for its Order, pursuant to K.S.A. 22-3502, for an arrest of the judgment of the jury and in support of this alternative bipartite Motion, states as follows:

1. Newly discovered evidence containing factual information unknown to either the defendant or his trial counsel has been uncovered by the defendant which is of such a credible and highly probative nature that the defendant states to the Court that if this evidence had been adduced by the defense, a different verdict would have resulted on April 16, 1982.

The nature and extent of the newly discovered evidence is contained and set forth in the affidavits of the following individuals:

- (a) Rita Fay Harris
- (b) Eddie Schultz
- (c) Victor Schultz
- (f) Lawrence E. Hale

These affidavits are attached hereto, marked Exhibits A, B, C and D respectively, and incorporated herein by reference.

2. As a separate basis for a new trial or arrest of judgment, the defendant further states to the Court that the conditions of defendant's bond as imposed by the Honorable Robert Jones, Associate Judge of the District Court of Johnson County, Kansas, prevented the defendant from properly investigating his case, properly seeking out witnesses such as those who have given supportive affidavits herein and, therefore, have effectively denied the defendant herein due process of law as guaranteed to him by the Federal and State Constitutions and amendments thereto.

Had the injunction against witness contact not been imposed, the defendant herein and his capable office staff could have and would have pursued an investigation which might have uncovered the substance of the testimony of these additional witnesses prior to the jury trial of April 12, 1982.

WHEREFORE, defendant prays for the Court's Order, pursuant to K.S.A. 22-3501, granting to the defendant a new trial or, in the alternative, for the Court's Order, pur-

suant to K.S.A. 22-3502, for an arrest of the judgment of the jury made and rendered on April 16, 1982.

Thomas Brooks Chartered
Attorneys & Counsellors at Law
200 Oak Park National Bank
11111 W. 95th Street
Overland, Park, KS 66214
913-492-2424

By: /s/ Thomas Brooks
Thomas Brooks

I hereby certify that I mailed a true and correct copy of the foregoing Motion to Mike Buser, Assistant District Attorney, Johnson County Courthouse, Olathe, Kansas 66061, this 26 day of April, 1982.

/s/ Thomas Brooks
Thomas Brooks

EXHIBIT "A"

(Caption Omitted)

AFFIDAVIT

STATE OF KANSAS)
) ss:
COUNTY OF JOHNSON)

RITA FAYE HARRIS, being first duly sworn upon her oath, swears that the following facts are true and correct:

1. The undersigned affiant is a resident of Johnson County, Kansas and resides at the present time at 921 Edgemere, Olathe, Kansas 66061. The undersigned's home telephone number is 913-782-4653.

2. The undersigned is personally acquainted with John Martin and his daughter, Nancy Martin. The undersigned affiant was a roommate of Nancy Martin in 1979 and in 1980 and during that time, had the opportunity to see and talk with John Martin.

3. In late November of 1980, this affiant was at John Martin's residence located at 101 S. Walnut, Olathe, Kansas. The purpose of this affiant's being at John Martin's residence was that Nancy Martin, John's daughter, was over at her father's home and at the time Rita was in Nancy's company.

4. This affiant states that the meeting at John Martin's house hereinabove referred to was in the evening, about 8:00 o'clock or 9:00 o'clock; it was in late November, but it was before Thanksgiving.

5. While at John Martin's residence on that evening, Mr. Martin said to this affiant, "Rita com' mere". I then went into the kitchen and saw that Mr. Martin was

drinking . . . he usually was, and then he asked me "Has Eddie ever been charged with arson?" I said, "Yeah, he's been arrested for it," and he said, "I'd like you to get ahold of your brother for me . . . I'd like to talk to him."

6. There were several times previously, i.e., prior to Thanksgiving of 1980, when I had been over to the house when Mr. Martin had made statements to the effect that "I wish this damned house were burned down, I'm sick of it."

I'm giving this Affidavit to Thomas Brooks of my own free will on the 22nd of April, 1982, at approximately 4:00 o'clock in the afternoon.

7. The reason that I never bothered to come forward with this information before now was that the Olathe Police have always given me and my family, especially my brother, alot of trouble and although I knew Bill, I didn't really think that the jury would believe John Martin's story against him, so I just never said anything to anybody.

8. The reason that I've decided to come forward with this information was that first of all, I didn't know that Bill was in all that much trouble, but then my mother and our family was sitting around discussing this over last weekend and it just dawned on us that we knew information that would help Bill and that's when we contacted his office, and by "we", I mean me and my brother, Eddie, and my cousin Vic.

The foregoing statements in this Affidavit are true and correct. I've been given the opportunity to add to this Affidavit, however, I do not wish to add to this Affidavit at this time. I have given this Affidavit to Mr. Brooks in his office at 200 Oak Park National Bank, 11111 W. 95th

Street, Overland Park, Kansas 66214 in the presence of Mr. William Wiswell, Ms. Donna Rolf, my brother, Eddie, and my cousin, Vic.

FURTHER AFFIANT SAYS NOT.

/s/ Rita Faye Harris
Rita Faye Harris

Subscribed and sworn to before me this 22nd day of April, 1982.

/s/ Marilyn C. Hull
Notary Public

My Appointment expires:
11/28/85

EXHIBIT "B"

(Caption Omitted)

AFFIDAVIT

STATE OF KANSAS)
) ss:
COUNTY OF JOHNSON)

EDDIE SCHULTZ, being first duly sworn upon his oath, swears that the following facts are true:

1. This affiant is a resident of Johnson County, Kansas and resides at 404 S. Keeler, Olathe, Kansas 66061. The affiant's home telephone number is 913-782-1059.

2. I am personally acquainted with John Martin.

3. I've known John Martin for 6 or 7 years.

4. In December of 1980 . . . it was about the middle of December, before Christmas, I was invited to John Martin's house for a party.

5. The party was in the evening, it was about 8:00 o'clock or 8:30. I came with some other people, my cousin, Vic was with me, Earla, who is Vic's sister was with us and also Bob Welborn was along (Bob took off shortly after we got there and went on foot down to a local bar).

6. John Martin had 2-1/2 or 3 cases of beer for his party and I sat down with him and we were having some conversation and after I'd had 3 or 4 beers . . . John was already pretty well loaded at the time . . . John asked me, "Have you ever been arrested for arson?" I said back to him, "Why do you want to know that for, sure I have." He then asked me how it turned out and I told him, "The charges were dismissed." John then asked me, "Do you want to make a little money?" I told him, "Doin what?" He said, "I'd like you to burn this house down." I told him, "No way, you're crazy." He said, "No, I'm serious," and he said, "I'd make a pretty good man for the job because they wouldn't come looking for you (affiant) because you've already been arrested for arson, they'd come looking for me (Martin), so you (affiant) wouldn't have anything to worry about." At that point, he started talking about money. He evidently had in mind collecting some insurance money out of this deal and in the course of the conversation, I asked him, "How much money?" He told me that everything in the house would, "go" (up in smoke), and I asked him again how much money, I'd already decided I didn't want to do it, but I let him go on talking because it was his beer. He told me he didn't know how much money he'd get back but it would be quite a bit. I still told him, "You're crazy," and left it at that.

Other than that one conversation back in December of 1980, I never talked to John Martin again about this.

I've known Bill Wiswell ever since the end of 1979, however, I never told Bill Wiswell about this information prior to the first of this week.

I was with my sister and our family and we were sitting around talking and my mom had said something about Bill Wiswell getting convicted of arson. I did not have any personal knowledge that that was Bill Wiswell's house before that and as they talked along over the weekend, I realized that I had some information that I probably should have told Bill and never did.

7. I know Vickie Bowman because she used to be my girlfriend. I knew that Vickie was going to be a witness in some kind of a case that involved Bill, but I didn't know what house it involved and I did pick up a subpoena at the Sheriff's office about a week and a half or two weeks ago. I called Mr. Wiswell's office to see whether I was supposed to come at the time it was set down on the subpoena and I was told that it would be a long trial . . . "a two-week trial", so that I shouldn't come in at the time on the subpoena.

I never heard anymore about it so I just forgot about it until we were sitting around talking about this with my family over the weekend.

I never have talked with Hugh Kreamer, nor have I ever imparted this information that I have set forth in this Affidavit to William Wiswell.

The information contained and set forth in this Affidavit is true and correct to the best of my knowledge.

8. I have nothing I wish to add to this Affidavit except there was one other thing that I did state to Bill Wiswell in his office yesterday that the very evening of

the fire, my cousin and I had gone to the drive-in movies over at the South Twin in Olathe. We left about 12:30 a.m. We went down Rogers Road going south and we turned right on Santa Fe and just as we were coming over the bridge, we saw John Martin alone in his blue pick-up speeding east on 150 Highway about 12:40 a.m. He took a hard right turn onto the exit ramp and went south on I-35.

I understand that this Affidavit is being dictated by Thomas Brooks at the time I am discussing this matter with Thomas Brooks and I understand further that the information that I have given Mr. Brooks is not in much chronologic order.

I further understand and it has been explained to me that this Affidavit is to be used to support a Motion for New Trial which Mr. Wiswell intends to file.

I have no objection to the giving of the Affidavit and as indicated above, the facts contained herein are true.

FURTHER AFFIANT SAYS NOT.

/s/ Edward A. Schultz
Eddie Schultz

Subscribed and sworn to before me this 22nd day of April, 1982.

/s/ Marilyn C. Hull
Notary Public

My Appointment expires:

11/28/85

EXHIBIT "C"

(Caption Omitted)

AFFIDAVIT

STATE OF KANSAS)
) ss:
COUNTY OF JOHNSON)

VICTOR SCHULTZ, being first duly sworn upon his oath, swears that the following facts are true:

1. This affiant is a resident of Johnson County, Kansas and resides 608 Bristol in Olathe, Kansas 66061. The affiant's home telephone number is 913-782-3880.

2. This affiant is the cousin of Eddie Schultz.

3. This affiant is personally acquainted with John Martin.

4. The affiant hereinafter will refer to himself in the first person.

5. "I have known John Martin for 4 or 5 years."

6. "I met John Martin through Nancy . . . his daughter."

7. "I was at the same Christmas party in December of 1980 that Eddie Schultz, my cousin Rita, Earla and Bob were at." "I don't remember exactly when in December it was but it was before Christmas." "We were all sitting around drinking beer and I was sitting right close to Eddie and John Martin. We were all right at the kitchen table and I heard John Martin asking Eddie . . . came out of nowhere . . . if he'd ever been arrested for arson." "Eddie said 'Yeh, I've been arrested for arson' and then Eddie said 'Why?'" "Well, John said he was sick and tired of the house and he wanted it burned

down." Then John said "I knew you'd been arrested for arson once and I thought if we could work something out, you'd do it again." Eddie said something about his being "crazy" and he also said "You're drunk and you don't know what you are talking about." Then Martin said "I'm talking about the insurance on the house." He told Eddie "You'll get half of it." He never did say an amount but he said he would get "Quite a bit." The way that conversation finished was that Eddie said "You're crazy and I don't want to have anything to do with it." The only other part of that conversation that I can remember was Eddie saying something about "You're not serious" and John Martin replying "I am serious. I'd like the damned place burned down." "That was all there was to it." "We all went up to The Stump after the party at the house when we ran out of beer and that was the last time I ever talked to John Martin."

"I knew about the fire at John Martin's house because we drove by his house on our way home after Eddie and I had been to the South Twin Drive-In. Just before getting to John's home, just as we came off Rogers Road and turned on Santa Fe, we saw John coming awfully fast in his blue pick-up east on Santa Fe and then he turned off just in front of us southbound on I-35. He was by himself as far as I could see.

I understand that this is an Affidavit. I understand that the statements that I've made to Thomas Brooks have been dictated by Mr. Brooks into his tape recorder at the time I've made these statements so as to enable him to prepare this in Affidavit form in connection with a new trial he anticipates filing on behalf of William Wiswell.

I knew that Bill Wiswell was in trouble with the law but I didn't know that the house on Walnut was a house owned by Bill.

Over this past week-end, at Rita's house, we were all sitting around (my Aunt Gladys, Eddie, Rita and me) talking about the newspapers and that Bill was involved with the John Martin fire, that he got convicted and it was then we thought that we really knew something that we ought to let somebody hear about."

"I did go over to the Sheriff's office and pick up a subpoena to testify in Bill's trial about a week and a half ago for testimony on the first Monday of the trial. I think that was the Monday before last. I called Bill's office and they said it would be a two week trial and I never heard anymore about it."

"I've given this information pretty much word for word exactly the way it is in this Affidavit to Thomas Brooks in the presence of William Wiswell and my cousin, Eddie Schultz. The information that I've given to Mr. Brooks that is in this Affidavit is true and correct and is given by me voluntarily."

"I understand that Mr. Brooks is going to use this information to file a Motion for a New Trial for Mr. Wiswell. I have no objection to the use of this information in that way."

FURTHER AFFIANT SAYS NOT.

/s/ Victor Schultz
Victor Schultz

SUBSCRIBED AND SWORN TO before me this 26 day of April, 1982.

/s/ Marilyn C. Hull
Notary Public

My Appointment Expires:

11-28-85

EXHIBIT "D"

(Caption Omitted)

AFFIDAVIT

STATE OF KANSAS)
) ss:
COUNTY OF JOHNSON)

LAWRENCE E. HALE, being first duly sworn upon his oath, swears that the following facts are true and correct:

1. The undersigned affiant is a resident of Johnson County, Kansas, and resides at the present time at 730 N. Clinton, Olathe, Kansas 66061. The undersigned's home telephone number is 913-782-2318.

2. The undersigned, in 1980, was a self-employed carpenter and did small remodeling jobs among other work.

In the late Spring of 1980, the undersigned was contacted by William Wiswell with regard to effecting needed renovations, repairs and remodeling to the premises at 101 S. Walnut in Olathe, Kansas.

3. The undersigned affiant agreed to do work for Mr. Wiswell as follows:

Sheetrocking, interior painting, minor repairs on the roof.

4. In May of 1980, this affiant commenced the work that he had contracted to do for Mr. Wiswell in an effort to bring the Walnut property into a proper state of repair.

5. At the time the affiant came on the job at 101 S. Walnut, he had occasion to meet John Martin.

6. During the 3 months this affiant was on the job at 101 S. Walnut on a part-time basis, this affiant had frequent occasion to see and talk to John Martin.

7. This affiant, during the course of time that he observed John Martin over a period of 3 months, never saw him on occasion when he was not drunk, notwithstanding the fact that he was in Mr. Martin's presence on more than 3 dozen occasions.

8. This affiant sometime in May of 1980 was approached by John Martin at a time when John Martin told this affiant that the property was going to be torched and he (Martin) wanted affiant's (Hale) help in moving out some of Martin's furniture in exchange for a few six-packs of beer. The affiant, not believing what he was hearing, jokingly said that he would take the microwave to move the furniture out and Martin then stated that, "We will see" whether you get the microwave or not.

9. This affiant further recalls John Martin mentioning in May of 1980 that he was going out to get contents insurance on the personal property and had figured out a way where he was going to insure the stuff that he did not have in order to collect more insurance.

10. This sort of conversation went on all summer, always at the instigation of Martin and it was easier for this affiant to just listen to it as opposed to telling him to shut-up because he wouldn't shut-up, he'd just keep on talking. In affiant's opinion, Mr. Martin is sort of a drunk "pushy little guy".

11. This affiant is aware that a fire did occur at the property in May of 1981 and at that time, this affiant knew Bill Wiswell.

12. In May of 1981 and before, this affiant had a great deal of domestic and marital problems and he really never connected back the previous conversations that he had with Mr. Martin with the fire that occurred a year later. During the several times that this affiant talked to Mr. Wiswell after May of 1981, Mr. Wiswell seemed confident that no one was going to believe Mr. Martin and so this affiant, for that reason as well as the reason that he was having problems with his marriage and other problems, never mentioned to Mr. Wiswell the fact of the conversations that this affiant had with John Martin.

13. After Bill got convicted, I figured that this was a pretty serious thing and that I should really tell somebody about what happened to Bill so I called and talked with his mother and told her what I knew and then Bill called me back and that is what brought me to the office of Thomas Brooks.

I've never seen nor met Thomas Brooks prior to this date and this affidavit is being dictated extemporaneously by Thomas Brooks in my presence, with my supplying the information that is contained and set forth in this affidavit without having been previously discussed between me and Mr. Brooks.

I am supplying this affidavit and supplying this information in an effort to bring to the Court's attention certain facts that had not been presented at the time of Mr. Wiswell's first trial.

If I had known that there was a possibility that Bill was going to get convicted, I sure would have come forward sooner, but I figured that there were alot of other people to help Bill and I didn't think that this information would, therefore, be that important.

The foregoing statements in this affidavit or true and correct. I've been given the opportunity to add to this affidavit, however, I do not wish to add to this affidavit at this time. I have given this affidavit to Mr. Brooks in his office at 200 Oak Park National Bank, 11111 W. 95th Street, Overland Park, Kansas 66214, in the presence of Mr. Wiswell and Victor Schultz, who came by to sign an affidavit that he gave Mr. Brooks last week.

FURTHER AFFIANT SAYS NOT.

/s/ Lawrence E. Hale
Lawrence E. Hale

Subscribed and sworn to before me this 26 day of April, 1982.

/s/ Marilyn C. Hull
Notary Public

My Appointment expires:

11/28/85

APPENDIX I

(Filed July 22, 1982)

IN THE DISTRICT COURT OF JOHNSON
COUNTY, KANSAS
CRIMINAL COURT DEPARTMENT

K-40005

STATE OF KANSAS,
Plaintiff,

vs.

WILLIAM C. WISWELL,
Defendant.

**DEFENDANT'S BRIEF IN SUPPORT OF
MOTION FOR NEW TRIAL**

Effective Assistance of Counsel

Kansas case law, in the Area of Effective Assistance of Counsel, has over the years and especially the last ten (10) years evolved into a consistent if somewhat vague standard for judging the performance of counsel in criminal trial work.

The major and most recent case in this area, *Schoonover v. State* 2 Kan. App. 481, 582 P.2d 292 (1979), contains a compilation of prior case law and sets out the general rule in this state for determining whether or not a criminal Defendant had effective assistance of counsel. The rule is a bipartite enunciation which states that not only will conduct of defense counsel which is so dishonest, incompetent or inadequate as to amount in practical effect to no counsel at all clearly violates the De-

fendant's Sixth Amendment right but also conduct which amounted to a substantial deviation from that expected of a reasonably competent lawyer in the community such that no lawyer of average ability would engage in it and which causes the client's conviction or otherwise works to the client's substantial disadvantage, is also a deprivation of the Constitutional guarantee of effective counsel.

The "reasonably competent" standard is essentially a malpractice standard, "a shorthand for the standard imposed by the Code of Professional Responsibility." *Id.* at 488.

"We cannot believe our Supreme Court would ever find counsel 'effective' in a constitutional sense where his malpractice (through incompetence or lack of zealouslyness) has been the cause of his clients conviction or otherwise worked to the clients detriment." *Id.* at 488. Of course, as the Court in *Schoonover* emphasized, when looking at the issue of effectiveness of counsel, following *Winter v. State*, 210 Kan. 597, 502 P.2d 722 (1972), the adequacy of counsel must be gauged in its *totality*. Defendant believes "totality" to include all aspects of the anatomy of a trial including, but not limited to, pretrial investigation and preparation for the trial as well as the trial itself.

It is the Defendant's contention in this case that the inadequacy of representation on the part of his counsel was as a result of his unknowing lack of his ordinary zealouslyness. It is the Defendant's contention that his prior defense counsel's deteriorating state of health, together with other commitments, caused him to turn over to the Defendant the bulk of the Defendant's own defense. The Defendant is admittedly incompetent to handle a criminal felony defense. In *Winters v. State*, 210 Kan. 597, 502 P.2d 733 (1972), a case that set out much of the Kansas law in this area prior to *Schoonover*, the case reported an at-

torney who is admittedly incompetent to handle a defense matter and, who in turn, turned the case over to a renowned criminal practitioner. It is fairly easy to differentiate between the *Winters* case and the case at bar for the reason that in the case at bar we have a respected criminal trial attorney essentially turning over the defense to an admittedly incompetent attorney, the Defendant. The fact that defense counsel, Kreamer, was in the midst of a death fight against the ravages and pain of pleural mesothelioma make defense counsel's actions totally understandable . . . however not at the expense of the Defendant's liberty, livelihood and law license.

As a result of defense counsel Kreamer's actions in turning over the bulk of the defense to the Defendant, the Defendant's prior counsel failed to do any pretrial discovery, failed to interview all but one of the Defendant's own witnesses, failed to prepare the Defendant for his testimony prior to putting the Defendant on the stand and failed to even consider reviewing Exhibit 23 prior to allowing it into evidence for jury consideration.

By failing to do discovery, Defendant's trial counsel failed to register proper objections to some damaging and totally inadmissible evidence (as set out in Defendant's First Amended Motion for New Trial or in the alternative, to Arrest Judgment, filed May 20th, 1982 and incorporated herein by reference).

The major cases in this area on both the state (*Schoonover*) and Federal levels (*United States v. Decoster* 624 F.2d 196 (1976), 487 F.2d 1197 (D. C. Cir. 1973), have noted that counsel should be guided by The American Bar Association's *Standards for Criminal Justice, The Defense Function*. It is Defendant's contention that his prior defense counsel failed to begin to comply with these basic, general standards, especially in the area of pre-trial in-

vestigation and preparation. See Specifically the Defense Function, Part IV Investigation and Preparation, 4-4.1 Duty to Investigate, and Part V. Control and Direction of Litigation (copies attached hereto and incorporated herein by reference).

The Defendant hired and had at his side one of the finest criminal trial attorneys eastern Kansas has ever known. It was not totally evident to the Defendant, or his present counsel, what the underlying reasons were for defense counsel Kreamer's attitude, actions and lack of trial preparation, investigation, etc. until the medical records from the M. D. Anderson Hospital and Tumor Institute, Texas Medical Center, Houston, Texas 77030 came into Defendant's possession after his present counsel secured a medical release from the defense counsel Kreamer. These records reveal the true nature of defense counsel Kreamer's serious medical condition, his rapidly deteriorating state of health, the constant pain which he has had for the past nine (9) months, the necessity of extensive chemotherapy treatment and constant use of medication. His medical condition caused him to be a mere shadow of his former self, denying him the abilities of even an average and ordinary lawyer. An entry in Mr. Kreamer's medical chart, shortly before the Defendant's trial, from the Pain Clinic at M. D. Anderson says it all in an opening paragraph. "FEB-12-82 PAIN CLINIC: This patient is referred for consultation because of pain in the right lower quadrant of his chest. This is through and through pain, and in addition to this, he has pain in his right shoulder from time to time. This has been present to a severe degree for the past two months. He has had it since last summer, but he feels that this is getting more intense, and occurs more frequently. Apparently, the only relief he ever gets from this is when he can take sleeping pills, and his Tylenol III and get into the bed at nighttime. He

states that the pain now is becoming debilitating and he cannot work more than to 3 o'clock in the afternoon. He has been taking plain Tylenol and Tylenol III only at night-time. He was placed on Amitriptyline. . . ." (page 28, attached hereto and incorporated herein by reference). Few, if any, humans could be expected to undertake the extensive treatment and endure the extensive pain that Defendant's prior counsel has and be expected to meet these standards of care imposed on criminal trial practitioners in this state.

The Court in Schoonover recognized that while the law does not guarantee the accused the most brilliant or experienced counsel, it does require honest, loyal, genuine, faithful representation. Defendant contends that while his former counsel might have wanted to be all these things his physical condition, which is now known to the Court and counsel, did not enable him to do so. His physical condition caused him to deviate from the standards of The American Bar Association and the Court of Appeals of the State of Kansas and of providing to the Defendant effective assistance of counsel as required by the Sixth Amendment of the United States Constitution.

For the foregoing reasons the Defendant respectfully submits that his Motion for New Trial should be granted.

Respectfully submitted:

Thomas Brooks Chartered
Attorneys & Counsellors At Law
200 Oak Park National Bank
11111 West 95th Street
Overland Park, KS 66214
913-492-2424

By: /s/ Thomas Brooks
Thomas Brooks

CERTIFICATE OF HAND-DELIVERY

I hereby certify that I hand-delivered a copy of the above and foregoing to Michael Buser, Assistant District Attorney, Johnson County Courthouse, Olathe, KS 66061 on this 22nd day of July, 1982.

/s/ Thomas Brooks
Thomas Brooks

APPENDIX J

(Filed August 16, 1982)

**IN THE
DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CRIMINAL DEPARTMENT**

No. K-40005

STATE OF KANSAS,
Plaintiff,

vs.

WILLIAM C. WISWELL,
Defendant.

JOURNAL ENTRY

Now on this 24th day of May, 1982, this matter comes on for hearing on defendant's motion for new trial and/or arrest of judgment before the Honorable John Gariglietti, Associate District Judge. The plaintiff, the State of Kansas, appears by Michael B. Buser and Joseph E. Cosgrove, Jr., Assistant District Attorneys. The defendant, William C. Wiswell, appears in person and with his counsel, Thomas Brooks.

Thereupon, both parties present evidence until such time as the Court continues the hearing.

Now on this 22nd day of July, 1982, this matter comes on for further hearing on defendant's motion for new trial and/or arrest of judgment with parties appearing as before.

Thereupon, the defendant presents evidence and rests. The State presents evidence and rests. The Court, being

well and duly advised in the premises, continues said hearing until the 23rd day of July, 1982.

Now on this 23rd day of July, 1982, this matter comes on for continuation of hearing on the defendant's motion for new trial and/or arrest of judgment. The State of Kansas appears by Joseph E. Cosgrove, Jr., an Assistant District Attorney. The defendant appears as before.

Thereupon, the Court, being well and duly advised in the premises, denies said motion.

IT IS THEREFORE BY THE COURT ORDERED, ADJUDGED AND DECREED that the defendant's motion for new trial and/or arrest of judgment should be and is hereby denied.

Thereupon, this matter comes on for sentencing. The Court inquires of the defendant if the defendant is ready to proceed with the allocution of sentence. The defendant replies in the affirmative.

Thereupon, the Court inquires of the defendant whether there is any lawful cause or reason why he should not now be sentenced upon his being convicted of the offenses of Aiding and Abetting Arson, Attempted Theft of Property of a Value of \$100.00 or More, Conspiracy to Commit Arson and Conspiracy to Commit Theft of Property of a Value of \$100.00 or More, and the defendant answers in the negative. No lawful cause or reason why sentence should not now be imposed being stated and none appearing to the Court, the Court pronounces sentence as follows:

IT IS THEREFORE BY THE COURT ORDERED, ADJUDGED AND DECREED that the defendant, William C. Wiswell, upon his being convicted of the offense of Aiding and Abetting Arson, as that offense is defined and classified in K.S.A. 21-3718 and K.S.A. 21-3205 as a class C felony

and further under the provisions of K.S.A. 21-4501(c) and K.S.A. 21-4603 be punished by commitment to the custody of the Secretary of Corrections of the State of Kansas for the following term of confinement:

The maximum term shall be ten year(s) the minimum term is hereby set at two year(s), which is within the limits as provided by law.

IT IS FURTHER BY THE COURT ORDERED that in addition to the above imposed sentence for the crime of Aiding and Abetting Arson, the defendant be punished by paying a fine of \$10,000.00, pursuant to K.S.A. 21-4503(1) (a) and K.S.A. 21-4603, and shall pay the costs.

IT IS FURTHER BY THE COURT ORDERED that the defendant, William C. Wiswell, upon his being convicted of the offense of Attempted Theft of Property of a Value of \$100.00 or More, as that offense is defined and classified in K.S.A. 21-3701 and K.S.A. 21-3301 as a class E felony and further under the provisions of K.S.A. 21-4501 (e) and K.S.A. 21-4603 be punished by commitment to the custody of the Secretary of Corrections of the State of Kansas for the following term of confinement:

The maximum term shall be five year(s) the minimum term is hereby set at one year(s) which is within the limits as provided by law.

IT IS FURTHER BY THE COURT ORDERED that the defendant, William C. Wiswell, upon his being convicted of the offense of Conspiracy to Commit Arson, as that offense is defined and classified in K.S.A. 21-3718 and K.S.A. 21-3302 as a class E felony and further under the provisions of K.S.A. 21-4501(e) and K.S.A. 21-4603 be punished by commitment to the custody of the Secretary of Corrections of the State of Kansas for the following term of confinement:

The maximum term shall be five year(s) the minimum term is hereby set at one year(s) which is within the limits as provided by law.

IT IS FURTHER BY THE COURT ORDERED that the defendant, William C. Wiswell, upon his being convicted of the offense of Conspiracy to Commit Theft of Property of a Value of \$100.00 or More, as that offense is defined and classified in K.S.A. 21-3701 (b) and K.S.A. 21-3302 as a class E felony and further under the provisions of K.S.A. 21-4501 (e) and K.S.A. 21-4603 be punished by commitment to the custody of the Secretary of Corrections of the State of Kansas for the following term of confinement:

The maximum term shall be five year(s) the minimum term is hereby set at one year(s) which is within the limits as provided by law.

Thereupon, the defendant moves for bench probation in this matter. The Court, being well and duly advised in the premises, sustains said motion.

IT IS THEREFORE BY THE COURT ORDERED, ADJUDGED AND DECREED that the defendant, William C. Wiswell, should be and is hereby granted probation for a period of two years pursuant to the order of Probation as set forth in the record and incorporated by reference herein including the conditions that the defendant pay the \$10,000.00 fine to the Clerk of the District Court, make restitution and attend counseling as directed.

Appeal bond in this matter is set in the amount of \$2,000.00, with a condition of the appeal bond being that the defendant pay the \$10,000.00 fine pending appeal.

The Court orders that a copy of this Journal Entry be forwarded to defense counsel forthwith.

/s/ John Gariglietti
John Gariglietti, Visiting Judge
Division VI
Johnson County District
Court

Submitted By:

/s/ Joseph E. Cosgrove, Jr. for
Michael B. Buser/lv
Assistant District Attorney
/s/ Joseph E. Cosgrove, Jr.
Joseph E. Cosgrove, Jr.
Assistant District Attorney

CERTIFICATE

I hereby certify that a true copy of the above and foregoing Journal Entry was placed in the U.S. Mail, postage prepaid to, Mr. Thomas Brooks, Attorney at Law, 11111 West 95th Street, Overland Park, KS 66214 or was placed in the document receptacle located in the District Clerk's Office on the 16th day of August, 1982.

/s/ Joseph E. Cosgrove, Jr.
Joseph E. Cosgrove, Jr.

(Filed August 2, 1982)

(Caption Omitted)

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that William C. Wiswell appeals to the Court of Appeals of the State of Kansas from the following decisions and judgments of The Honorable John Gariglietti, Associate Judge of the District Court:

1. Judgment of conviction of William C. Wiswell wherein there was a judgment of conviction against the said William C. Wiswell for violation of the following criminal statutes of the State of Kansas:

COUNT I - K.S.A. 21-3718, K.S.A. 21-3205 and K.S.A. 21-4501(c);

COUNT II - K.S.A. 21-3701, K.S.A. 21-3301 and K.S.A. 21-4501(e);

COUNT III - K.S.A. 21-3718, K.S.A. 21-3302 and K.S.A. 21-4501(e);

COUNT IV - K.S.A. 21-3701(b), K.S.A. 21-3302 and K.S.A. 21-4501(e),

as well as the subsequent concurrent sentences of one (1) year minimum to five (5) years maximum on Counts II, III and IV, and two (2) years minimum to ten (10) years maximum from which the Honorable John Gariglietti granted bench probation.

2. Order and judgment of the Honorable John Gariglietti, Associate Judge of the District Court, refusing to give and grant to the defendant, William C. Wiswell, a new trial.

3. Rulings and decisions of The Honorable John Gariglietti, Associate Judge of the District Court, wherein

expert testimony of Robert Boudet, M.D. was not allowed to be received and considered by the Court relative to Dr. Boudet's opinions regarding the health, well-being and ability to perform as trial counsel of Hugh Kreamer, Esquire, the defendant's former attorney.

4. The defendant also appeals from any and all other adverse rulings of the Honorable John Gariglietti, Associate Judge of the District Court, assigned to the District Court of Johnson County, Kansas, either during the trial of William C. Wiswell or during the proceedings which were heard on May 24, 1982 and July 22, 1982.

/s/ William C. Wiswell
William C. Wiswell
Thomas Brooks Chartered
Attorneys & Counsellors at Law
200 Oak Park National Bank
11111 W. 95th Street
Overland Park, KS 66214
913-492-2424

By: /s/ Thomas Brooks
Thomas Brooks

I hereby certify that I mailed a true and correct copy of the foregoing Notice to Mike Buser, Esq., District Attorney's Office, Johnson County Courthouse, Olathe, Kansas, this 2nd day of August, 1982.

/s/ Thomas Brooks
Thomas Brooks

APPENDIX K

(Filed August 19, 1982)

**IN THE DISTRICT COURT OF JOHNSON COUNTY,
KANSAS
CRIMINAL COURT DEPARTMENT**

NO. K-40005

**THE STATE OF KANSAS,
Plaintiff,**

vs.

**WILLIAM C. WISWELL,
Defendant.**

ORDER OF PROBATION

NOW on this 23rd day of July, 1982, this matter comes on for hearing of defendant's application for parole.

The Court grants probation to defendant for a period of 2 years, upon the following conditions:

1. Defendant shall not again violate the law of the State of Kansas and shall not violate the law of any other state or of the United States of America, and shall not violate the ordinance of any city.
2. Defendant shall not consume intoxication liquor or cereal malt beverage to excess.
3. Defendant shall not associate with anyone who has been convicted of a felony.
4. Defendant shall pay court costs assessed herein within 60 days from this date.

5. Defendant shall not change his residence without prior notification to and the permission of the parole officer.
6. Defendant shall report to the parole officer at such time and in the manner as directed by the parole officer and shall abide by any further conditions the parole officer may require.
7. Defendant shall pay a fine of \$10,000.00.
8. Defendant shall make restitution for actual medical, hospital and prescription expenses, if any, incurred by Sydney L. Barker.
9. Defendant shall participate in counseling as directed by the probation department.

DISTRICT COURT OF JOHNSON COUNTY, KANSAS

/s/ John Gariglietti
Associate District Judge

I have read the foregoing order of probation, understand the conditions thereof and agree to abide by and keep the conditions of my probation so long as it shall be in effect.

/s/ William C. Wiswell
Defendant



2
No. 83-1598

Office - Supreme Court, U.S.

FILED

JUN 14 1984

ALEXANDER L. STEVAS.

CLERK

In the Supreme Court of the United States

October Term, 1983

WILLIAM C. WISWELL,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF KANSAS

RESPONDENT'S BRIEF IN OPPOSITION

JOHN L. McCLAIN

(Counsel of Record)

JOSEPH E. COSGROVE, JR.

Assistant District Attorney
for the 10th Judicial District
Johnson County Courthouse
P.O. Box 728

Olathe, Kansas 66061

(913) 782-5000

Counsel for Respondent

QUESTIONS PRESENTED

- 1) Whether the Supreme Court has jurisdiction to consider this case?
- 2) Whether further Supreme Court guidance is needed on the standard of effective assistance of counsel?
- 3) Whether the Kansas appellate courts have applied a constitutionally permissible test of effective assistance of counsel?



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No. 83-1598
In the Supreme Court of the United States

October Term, 1983

WILLIAM C. WISWELL,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF KANSAS**

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, State of Kansas, respectfully requests that this Court deny the petition for writ of certiorari.

JURISDICTION

The petitioner asserts jurisdiction pursuant to Title 28, United States Code, §1257(3). Evidently, the petitioner relies on that portion of the statute referring to a right set up or claimed by the Constitution, the Sixth Amendment's right to effective assistance of counsel. Further examination of the petition's reasons for granting review reveals that the petitioner's real complaints are that there exists in the law hazy, ill-defined standards of competency; Kan-

sas appellate courts improperly rely on the totality of circumstances test and have ignored *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973), 624 F.2d 196 (D.C. Cir. 1976) and the American Bar Association's Standards for Criminal Justice. The petitioner did not raise the preceding issues at the state court level. Thus, although a federal question may be involved, the petitioner has not raised the issues in a proper time and place and this Court is without jurisdiction.

Supreme Court decisions have long been consistent and clear that federal questions must be raised and decided by the state court below before the Supreme Court has jurisdiction. *Maxwell v. Newbold*, 59 U.S. 511 (1856); *Baldwin v. Kansas*, 129 U.S. 52 (1889); *Herndon v. Georgia*, 295 U.S. 441 (1935); *Homes Ins. Co. v. Dick*, 281 U.S. 397 (1930); *Honeymoon v. Hanan*, 30 U.S. 14 (1937); and *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

A review of the Kansas Court of Appeals' decision, *State of Kansas v. Wiswell*, No. 54,873 (Kan. October 6, 1983), found in the petition, reveals that the only questions presented and decided in this case were an evidentiary question and whether the trial judge abused his discretion in rejecting the claim the defendant was denied effective assistance of counsel. The issues in the petition outlined above were not raised or decided at the state court level.

Therefore, because petitioner's issues were not raised and decided below, this Court does not have jurisdiction.

REASONS FOR DENYING THE WRIT

Convicted criminal defendants have increasingly carried the torch of "ineffective assistance of counsel" claims to appellate courts. The petitioner is one of these defendants. The petitioner basically argues that there are unclear legal standards as to effective assistance of counsel and that the Kansas courts have improperly reviewed such complaints. Finally, he requests guidance of the Supreme Court to state appellate courts on this general issue. In the light of two extremely recent Supreme Court decisions, *United States v. Cronin*, 52 U.S.L.W. 4560, No. 82-660 (May 14, 1984), and *Strickland v. Washington*, 52 U.S.L.W. 4565, No. 82-1554 (May 14, 1984), and the history of Kansas law on the subject, the petition is without merit, in fact and law, and must fail even if the Court finds it has jurisdiction.

Strickland held that the proper standard for attorney performance is that of "reasonably effective assistance". *Strickland*, 52 U.S.L.W. at 4570. The latter standard was not a deviation from past Supreme Court decisions, but was in keeping with the standard expressed in *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). If the Court would grant writ of certiorari in this case and adopt some new test offered by the petitioner, it would only serve to create confusion on an issue that has now been clearly clarified.

Kansas has been applying the constitutional test of "reasonably effective assistance" for several years. Petitioner cites *Schoonover v. State*, 218 Kan. 377, 543 P.2d 881, cert. denied 424 U.S. 944 (1976), but neglects to mention in his reasons for granting review the precise and scholarly decision of *Schoonover v. State*, 2 Kan. App. 2d 481, 582 P.2d 292, rev. denied 225 Kan. 845 (1978).

In the latter decision, the appellant unsuccessfully argued that there had been a change in the law on the effective assistance of counsel in *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973). The Kansas Court of Appeals held that *DeCoster* was not a "new" standard but indeed had "been applied in Kansas for many years." *Schoonover*, 2 Kan. App. 2d at 485.

Strickland stated that, "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances". *Strickland*, 52 U.S.L.W. at 4570. *Strickland* also indicated the ABA Standards for Criminal Justice are only guides. Similar to applying the "reasonably effective assistance" test standard, the Kansas appellate courts have properly reviewed the assistance of counsel under the microscope of "totality of circumstances" test. In addition, the Kansas courts have correctly used the ABA Standards as guides. *Schoonover*, 2 Kan. App. 2d at 484.

The Kansas legal exposition for all of the above, which was applied in this case, reads:

2. CONSTITUTIONAL LAW - Right to Effective Assistance of Counsel. The right to effective assistance of counsel presupposes that counsel will be competent and capable of conducting a genuine defense on behalf of the accused. While the law does not guarantee the assistance of the most brilliant and experienced counsel, it does require honest, loyal, genuine and faithful representation on the part of counsel, be he retained or appointed.

3. SAME - Right to Effective Assistance of Counsel - Conduct which Deprives Defendant of Effective Counsel. Conduct of defense counsel which is so dishonest,

incompetent or inadequate as to amount in practical effect to no counsel at all clearly violates a defendant's Sixth Amendment right to counsel. However, conduct which amounts to a substantial deviation from that expected of a reasonably competent lawyer in the community, such that no lawyer of average ability would engage in it, and which causes the client's conviction or otherwise works to the client's substantial disadvantage, is also a deprivation of the constitutional guarantee of "effective" counsel.

4. SAME - Right to Effective Assistance of Counsel - Totality of Counsel's Representation Considered. In applying the foregoing standard to counsel's performance, the effective assistance of counsel cannot be equated with the successful assistance of counsel. The adequacy of an attorney's services on behalf of an accused must be gauged by the totality of his representation, not by fragmentary segments analyzed in isolated cells. *Schoonover v. State*, 2 Kan. App. 2d 481, Syl. ¶ 1, 2, 3 and 4.

Using sound logic Justice O'Connor wrote in *Strickland* that "more specific guidelines" than "reasonableness" under professional norms are "not appropriate". *Strickland*, 52 U.S.L.W. at 4570.

Thus, petitioner's claim that competency is ill-defined and that further guidance is needed from the Supreme Court flies in the face of extremely recent Supreme Court decisions and Kansas case law.

The petitioner, and all criminal defendants, must accept the fact that there is no precise acid test of determining the effectiveness of counsel given the many variables surrounding each case. The reasonably effective assistance under the totality of circumstances review is the

best invention of insuring that the Sixth Amendment is followed.

This issue of effectiveness was indeed the subject of a "second trial". See, *Strickland*, 52 U.S.L.W. at 4571. The post-trial motion on this issue was followed by a three-day evidentiary hearing before the trial judge. That hearing was then reviewed with approval by the Kansas Court of Appeals. This petition further unnecessarily bleeds the judicial system of time and resource. The proper standard of effectiveness has been applied and followed to insure that the defendant received the Sixth Amendment's goal of a fair adversarial trial.

Moreover, the petitioner has failed to demonstrate any error that caused prejudice which necessitates Supreme Court review. See, *Strickland*, 52 U.S.L.W. at 4571, 4572. Specifically, the petitioner is asking that the Court "infer" that he received ineffective assistance because of his attorney's illness. Inferring ineffectiveness of assistance was specifically rejected in *U. S. v. Cronin*, supra.

In sum, the standard of effective assistance is not hazy or ill-defined but is one word "reasonable". The Kansas Courts properly review such claims, using the Supreme Court approved concept of "reasonable" under the "totality of circumstances". Kansas has not sidestepped *DeCoster* or the ABA Standards but has incorporated their guidance in its review. Finally, no further guidance in this area is appropriate or needed from the Supreme Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel of Record

JOSEPH E. COSGROVE, JR.

Assistant District Attorney

10th Judicial District

Johnson County Courthouse

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Counsel for Respondent

4
No. 83-1598

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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1983

WILLIAM C. WISWELL,
Petitioner,

VS.

STATE OF KANSAS,
Respondent.

APPENDIX TO PETITIONER'S BRIEF IN REPLY

THOMAS BROOKS

(Counsel of Record)

THOMAS BROOKS CHARTERED

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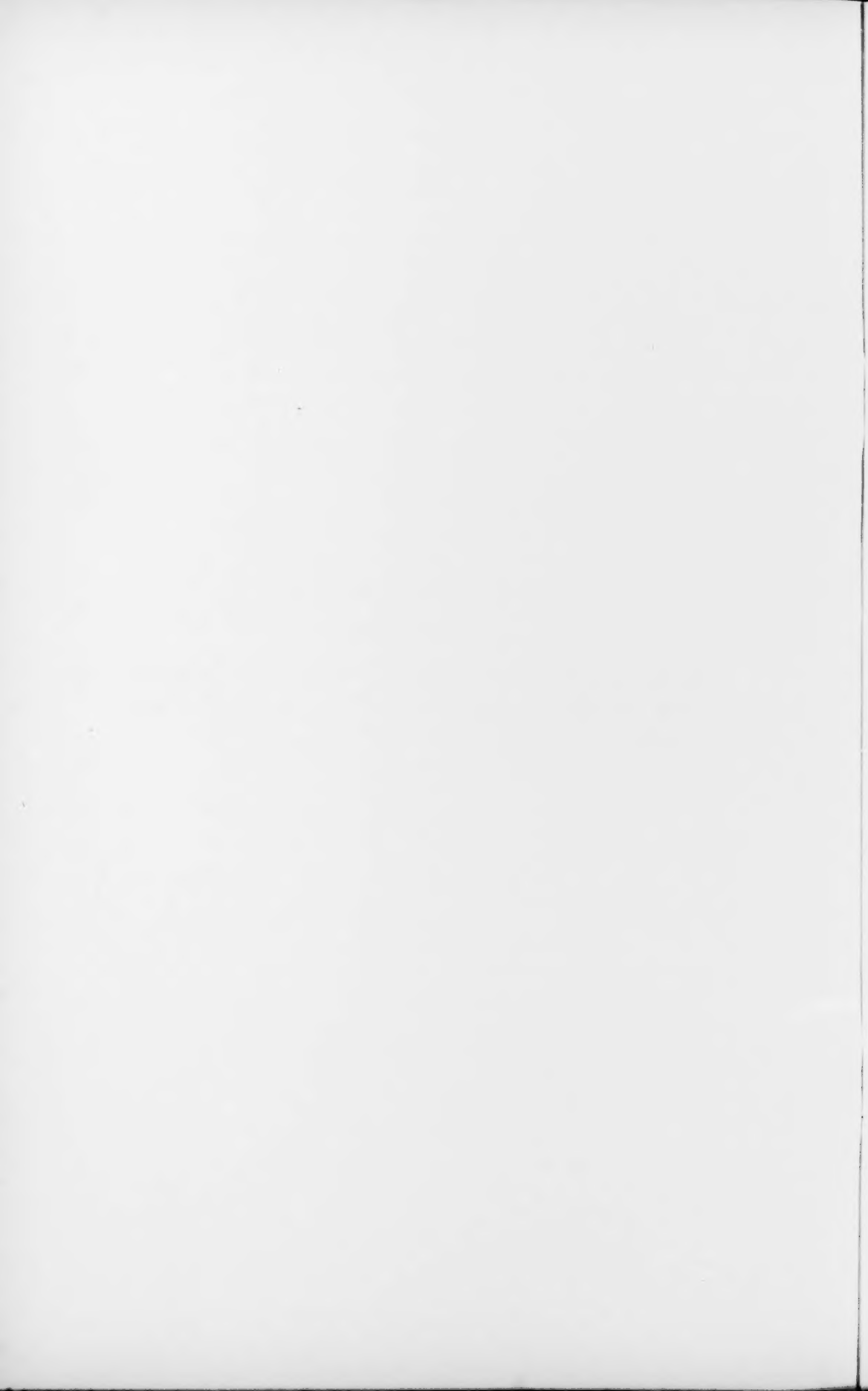
Attorney for Petitioner

William C. Wiswell

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(Received July 30, 1984)

IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CRIMINAL COURT DEPARTMENT

NO. K-40005

STATE OF KANSAS,
Plaintiff,

vs.

WILLIAM WISWELL,
Defendant.

**FIRST AMENDED MOTION FOR NEW TRIAL
OR, IN THE ALTERNATIVE, TO
ARREST JUDGMENT**

COMES NOW the Defendant, by and through his attorney of record, Thomas Brooks, and moves the Court for its Order, pursuant to K.S.A. 22-3501, granting to the Defendant a new trial or, in the alternative, the Defendant moves the Court for its Order, pursuant to K.S.A. 22-3502, for an arrest of the judgment of the jury and in support of this alternative bipartite Motion, states as follows:

I. NEWLY DISCOVERED EVIDENCE

1. Newly discovered evidence containing factual information unknown to either the Defendant or his trial counsel has been uncovered by the Defendant which is of such a credible and highly probative nature that the Defendant states to the Court that had this evidence been adduced by the defense, a different verdict would probably have resulted on April 16, 1982.

The nature and extent of the newly discovered evidence is contained and set forth in the affidavits of the following individuals:

- (a) Rita Faye Harris
- (b) Eddie Schultz
- (c) Victor Schultz
- (d) Larry E. Hale

The affidavits of Rita Faye Harris, Eddie Schultz and Victor Schultz were attached to the initial Motion for New Trial previously filed herein. The affidavit of Larry Hale is attached hereto and incorporated herein by reference.

2. As a separate basis for a new trial or arrest of judgment, the Defendant further states to the Court that the conditions of Defendant's bond [2] as imposed by the Honorable Robert Jones, Associate Judge of the District Court of Johnson County, Kansas, prevented the Defendant from properly investigating his case, properly seeking out witnesses such as those who have given supportive affidavits herein and, therefore, have effectively denied the Defendant herein due process of law as guaranteed to him by the Federal and State Constitutions and amendments thereto.

Had the injunction against witness contact not been imposed, the Defendant herein could have and would have pursued an investigation which might have uncovered the substance of the testimony of these additional witnesses prior to his jury trial of April 12, 1982.

II. ADEQUACY OF COUNSEL

The Defendant contends that he has a constitutional right to effective counsel under the Sixth Amendment to the U.S. Constitution and further contends that the facts and circumstances surrounding the defense that he was afforded denied him the effective and substantial aid to which he is entitled under the Sixth Amendment and, therefore, deprived him of due process of law under the Fifth and Fourteenth Amendments.

The Defendant specifically contends that his counsel's work schedule, including other substantial trial commitments and state of health, left the Defendant's counsel in such a debilitated physical condition as to cause the following errors, omissions and inadequacies of the Defendant's trial counsel:

A. There was next to no preparation by defense counsel for trial of the captioned matter, instead defense counsel delegated trial preparation to the Defendant who, at best, is not competent to assist in his own defense or anyone else's in felony trial proceedings in this state.

B. There were no pretrial motions or motions in limine regarding subsequent irrelevant, inflammatory and prejudicial evidence which the trial Court was forced to receive because there was no objection to the evidence.

C. There was no pretrial discovery.

D. Defendant's counsel failed to interview any potential witnesses in the case with the lone exception of Vicki Bowman.

[3] E. Next to no pretrial research was considered or completed by the Defendant's counsel and the only research attempted or completed during trial was done by Defendant's secretary and then handed to Defendant's counsel who then read it into the record on the morning of the third (3) day of trial.

F. The Defendant's counsel did not have any prepared questions for any defense witnesses nor any previously prepared cross-examination of any prosecution witnesses.

G. The Defendant's counsel failed to register any objection to damaging, otherwise totally irrelevant and otherwise totally inadmissible trial testimony and trial exhibits throughout the course of the trial.

H. The Defendant's counsel failed to read the one hundred sixteen (116) page court reported statement of the Defendant (inadmissible under Missouri Rules for the reason that it was never read, reviewed, corrected and signed by the Defendant) (Page 114; Line 3 . . . Mr. McCann . . ." This will be typed up. And, as you know, Bill, it must be read and signed by you before a notary.") This one hundred sixteen (116) page statement, which went to the jury for its consideration, contains totally inflammatory, prejudicial, irrelevant and clearly inadmissible matters regarding the Defendant's personal income tax returns for various years in the late 70's and his non-filing of his tax returns. Not only did Defendant's counsel not read the exhibit, but he let the exhibit into evidence without objection and sat at the counsel table during closing argument while the prosecutor harped on

Mr. Wiswell's non-filing of tax returns and made no objection.

I. Defense counsel failed to object to items placed into evidence in Defendant's trial which were taken in the search of the Defendant's premises but not listed on the search warrant.

J. Defense counsel failed to review with the Defendant prior to the Defendant's going on the witness stand, the multitude of documents which would be thrust in front of the Defendant on cross examination all to the Defendant's detriment, i.e., defense counsel failed to properly prepare his client for cross examination.

14] K. The defense counsel ceased questioning John Martin in cross examination prior in time to reaching the threshold of important areas brought out by John Martin which were in conflict with his testimony at preliminary hearing.

L. The defense counsel failed to object to physical evidence in the form of a gasoline can found in an area geographically remote to the property involved in the alleged arson and the gas can was admitted into evidence without objection.

M. Defense counsel failed on redirect examination of Mr. Wiswell to clear up areas brought out by the prosecutor, specifically including the Four Thousand Dollars (\$4,000.00) mentioned in the taped telephone call. The failure on the defense counsel's part to effectively redirect examine his client left the Defendant naked to the jury's scrutiny following effective cross examination by the prosecution.

N. The prosecutor, in connection with the Defendant's prosecution and as a tenacious advocate, continually ham-

mered and hammered and harped upon the Defendant's not filing tax returns, upon photographic evidence and video tapes of the house in question (repeated three (3) times) and was able to emphasize such points which, if not clearly inadmissible because of relevancy or materiality, would be inadmissible on the issue of repetition and redundancy, however, the prosecutor was able to effectively hammer a full can of nails into the Defendant's coffin because there wasn't any objection at any point of the prosecution's closing argument by defense counsel.

O. Notwithstanding the fact that the Defendant supplied defense counsel with necessary information for the interviewing of potential witnesses, no such witness interviewing was undertaken by defense counsel.

P. Defense counsel refused to allow Defendant to bring character witnesses to the witness stand to testify on his behalf relative to his truthfulness and integrity. In this regard, defense counsel refused to allow the Honorable Herbert W. Walton, et al. to testify as character witnesses [5] because the prosecution would then be able to bring up other specific acts claimed perpetrated by the Defendant. (Clearly inadmissible.)

Q. The defense counsel failed to conduct critical voir dire examination as requested by the Defendant.

R. When the Defendant retained defense counsel, the Defendant was unaware of defense counsel's drastically deteriorating state of health. Defense counsel's health and trial commitments were such that defense counsel should have either withdrawn from the Defendant's case or sought assistance in the preparation and presentation of the Defendant's case from another member of his firm.

S. If the Defendant had been afforded effective counsel, much of the State's proffered case never would have

been given to the jury and a different result would likely have occurred¹.

The Defendant submits that all he is entitled to is a reasonably competent attorney acting as his diligent, conscientious advocate as required by the Sixth Amendment of the U.S. Constitution. The failures on the part of defense counsel, due in large part to defense counsel's health, are such a blatant and serious departure from the standard of care expected from criminal trial counsel in Kansas that it falls far below what might be expected from an ordinary, admittedly human and fallible trial lawyer.

T. Defense counsel otherwise failed to prepare his case for trial and committed other errors during the course of the trial which, taken in the *totality of the representation afforded* (*Schoonover v State*, 218 Kan. 377, 543 P.2d 881, 1975) was less than the representation to which the Defendant is entitled.

III. ORDER AGAINST PROSECUTION WITNESS CONTACT BY DEFENSE/GAG ORDER

Preliminary orders of Judge Gerald Hougland and Judge Robert Jones ordering and directing the Defendant to "have no contact with any witnesses endorsed by state on face of information" (May 14, 1981) and not to "contact, directly or indirectly, or cause to be contacted any of the endorsed (sic) witnesses of State" (May 14, 1981), deprived the Defendant of an opportunity to interview and examine prosecution witnesses in advance of his trial. The [6] Defendant contends that the mandate or gag order by the trial judges mentioned refusing to permit the Defendant to interview State witnesses denied the Defendant a fair trial. In this regard, defense counsel's testimony will reveal the fact that he turned over to the

Defendant the total responsibility of finding and interviewing witnesses and potential witnesses and did no witness investigation or interviewing by himself other than to take the deposition of Vicki Bowman in his office when Vicki Bowman was brought to him by the Defendant. Query: If the Defendant is under a gag order and if the defense counsel turned over a responsibility (which he should not have delegated to the Defendant in the first instance) then who on the defense team was going to interview and investigate the myriad of witnesses listed on the State's initial information and the State's amended information so as to learn what the State's case was all about so as to properly prepare for cross examination of the State's case?

WHEREFORE Defendant prays for the Court's Order, pursuant to K.S.A. 22-3501, granting to the Defendant a new trial or, in the alternative, for the Court's Order, pursuant to K.S.A. 22-3502, for an arrest of the judgment of the jury made and rendered on April 16, 1982.

THOMAS BROOKS CHARTERED
Attorneys & Counsellors At Law
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913-492-2424

By: /s/ Thomas Brooks
Thomas Brooks

I hereby certify that I hand-delivered a true and correct copy of the foregoing First Amended Motion to Mike Buser, Esq., District Attorney's Office, Johnson County Courthouse, Olathe, KS 66061, this 20th day of May, 1982.

/s/ Thomas Brooks
Thomas Brooks

No. 83-1598

Office - Supreme Court, U.S.
FILED

JUL 20 1984

ALEXANDER L. STEWAS,
CLERK

In the Supreme Court of the United States

October Term, 1983

WILLIAM C. WISWELL,
Petitioner,

VS.

STATE OF KANSAS,
Respondent.

PETITIONER'S BRIEF IN REPLY

THOMAS BROOKS

(Counsel of Record)

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Attorney for Petitioner

William C. Wiswell

QUESTION PRESENTED IN REPLY

Does the Supreme Court have jurisdiction to consider this case?

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No. 83-1598

In the Supreme Court of the United States

October Term, 1983

WILLIAM C. WISWELL,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

PETITIONER'S BRIEF IN REPLY

The petitioner, William C. Wiswell, respectfully suggests to the Court that the claimed infringement upon his Sixth Amendment rights and the Federal question arising therefrom was raised by petitioner's instant counsel at each and every opportunity afforded him. While the Kansas Appellate Courts in their confirming decisions may have avoided any specific address to the issue of a claimed infringement of the petitioner's constitutional right to adequate and effective counsel pursuant to the Sixth Amendment of the U.S. Constitution, the petitioner would respectfully submit to the Court the following information:

1. Petitioner, through the prior representation afforded him, was found guilty by a jury on April 16, 1982.

2. Petitioner's instant counsel entered his appearance on behalf of petitioner and filed a Motion for New Trial on April 26, 1982.

3. Petitioner's instant counsel, upon receipt of the medical records from M. D. Anderson Tumor Institute in Houston, Texas on petitioner's former counsel, Hugh Harrison Kreamer, filed a First Amended Motion for New Trial or, in the Alternative, to Arrest Judgment on May 24, 1982.

4. Included among the grounds for new trial was paragraph numbered II which stated as follows:

"II. ADEQUACY OF COUNSEL

The Defendant contends that he has a constitutional right to effective counsel under the Sixth Amendment to the U.S. Constitution and further contends that the facts and circumstances surrounding the defense that he was afforded denied him the effective and substantial aid to which he is entitled under the Sixth Amendment and, therefore, deprived him of due process of law under the Fifth and Fourteenth Amendments.

The Defendant specifically contends that his counsel's work schedule, including other substantial trial commitments and state of health, left the Defendant's counsel in such a debilitated physical condition as to cause the following errors, omissions and inadequacies of the Defendant's trial counsel. . ."

Thereafter, alphabetical specifications A through T followed.

5. After a denial of petitioner's Motion for New Trial, petitioner's Brief to the Kansas Court of Appeals contained as one of the issues, the following:

THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA GUARANTEES A CRIMINAL DEFENDANT THE RIGHT TO COUNSEL. THE UNDISCLOSED, DEBILITATING, TERMINAL ILLNESS OF DEFENSE COUNSEL, HUGH HARRISON KREAMER, COUPLED WITH HIS PHYSICAL INABILITY TO WORK PAST 3:00 IN THE AFTERNOON TOGETHER WITH THE NECESSITY FOR HIS INGESTION OF MOOD ELEVATING DRUGS WAS SUCH THAT THE DEFENDANT, WILLIAM C. WISWELL, RECEIVED INADEQUATE AND INEFFECTIVE COUNSEL DURING HIS CRIMINAL PROSECUTION AND THE TRIAL OF HIS CASE, AND IS THEREFORE ENTITLED TO HAVE HIS CONVICTION OVERTURNED.

6. The issue with regard to competency of counsel and infringement upon petitioner's Sixth Amendment right to adequate and effective counsel was again raised by the petitioner in a Petition for Review of an Adverse Decision from the Kansas Court of Appeals which was filed in the Kansas Supreme Court on November 4, 1983.

CONCLUSION

From the foregoing, it appears clear that at each and every step of the proceedings heretofore afforded to the petitioner, the petitioner raised and complained of the adequacy and effectiveness of his former attorney for the reason that his former attorney had undisclosed, debilitating cancer which caused him to ingest pain killing and mood elevating drugs and which would not allow him to work past 3:00 o'clock in the afternoon.

From the foregoing it appears clear that a Federal question regarding the adequacy of petitioner's counsel was raised and presented ab initio.

From the foregoing, it appears clear that once the medical records from the M. D. Anderson Tumor Institute in Houston, Texas were uncovered by petitioner's instant counsel and the First Amended Motion for New Trial was filed, the petitioner, at each and every stage of the proceeding, raised and requested the appropriate Court to consider the question of adequacy and effectiveness of the representation afforded him by his trial counsel.

The petitioner respectfully prays that the Supreme Court consider and grant his Petition for Writ of Certiorari.

Respectfully submitted,

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Attorney for Petitioner

William C. Wiswell

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